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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LORENZO BRIONES et al., Plaintiffs and Appellants, v. EVELYN RAMOS, Defendant and Respondent.	B212801 (Los Angeles County Super. Ct. No. KC051358)

APPEAL from an order of the Superior Court of Los Angeles County, Bruce Minto, Judge. Affirmed.

The Law Office of Rummel Mor Bautista and Rummel Mor Bautista for Plaintiffs and Appellants.

Rients & Lonner, Jeffrey B. Lonner and David B. Rients for Defendant and Respondent.

Lorenzo Briones and Nancy Briones, husband and wife, appeal from an order awarding Evelyn Ramos and her son, James Duldulao, attorney fees and costs in the amount of $5,148.50 following the Brioneses' dismissal of their lawsuit against Ramos and Duldulao. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2005 Ramos purchased the Brioneses' home, agreeing the Brioneses, who were in poor health, could continue to live in the home in exchange for rent and their agreement to cooperate if Ramos decided to convert the home into a board and care facility. The residential purchase agreement executed by Ramos and Lorenzo Briones had an attorney fee provision, which stated, "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller . . . ."

In September 2007 the Brioneses filed a lawsuit against Ramos and Duldulao, as well as the real estate brokerage firm and its agent who had represented Ramos and Lorenzo Briones in a dual capacity, alleging claims including breach of contract, fraud and elder abuse arising out of Ramos's purchase of the Brioneses' home. In February 2008 the Brioneses dismissed the real estate brokerage firm and agent from the action pursuant to a negotiated settlement. According to the Brioneses, the brokerage firm and agent had settled before the case was filed; the primary reason for the lawsuit was to allow them to obtain a good faith settlement determination.

The action remained pending against Ramos and Duldulao. A final status conference was held in early October 2008. After counsel for the Brioneses failed to appear, an order to show cause re sanctions was scheduled for October 20, 2008, the date also set for trial. Counsel for Ramos and Duldulao served written confirmation of the trial date and the order to show cause on the Brioneses.

The Brioneses dismissed the case without prejudice on October 14, 2008. Counsel for Ramos and Duldulao asserted he had not been informed of the dismissal and thus had prepared and appeared for trial. In late October 2008 Ramos and Duldulao filed a motion

for attorney fees and costs, seeking $8,867.39 pursuant to the fee provision in the purchase agreement. After a hearing that counsel for the Brioneses again failed to attend, the trial court awarded Ramos and Duldulao $3,718.50 in attorney fees and $1,430 in costs.

DISCUSSION

1. *Governing Law*

Civil Code section 1717, subdivision (a), authorizes the trial court to award reasonable attorney fees to the prevailing party in a contract action if the contract specifically provides for an award of such fees.[1] "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b)(1).) However, section 1717, subdivision (b)(2), provides, "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." Section 1717, subdivision (b)(2), "overrid[es] or nullif[ies] conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617 (*Santisas*).)

As here, contract claims may be joined with other causes of action that do not sound in contract. "If the voluntarily dismissed action also asserts causes of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action." (*Santisas*, *supra*, 17 Cal.4th at p. 617.) Because section 1717, including the definition of prevailing party, is no longer controlling, the attorney fee provision in the parties' agreement is relevant to determining both "whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision." (*Exxess Electronixx v. Heger*

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1 Statutory references are to the Civil Code unless otherwise indicated.

Reality Corp. (1998) 64 Cal.App.4th 698, 708.) "If, as here, the contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (*Santisas,* at p. 622; see *Donner Management Co. v. Schaffer* (2006) 142 Cal.App.4th 1296, 1310 ["In the absence of legislative direction in the attorney fees statute, the courts have concluded that a rigid definition of prevailing party should not be used. [Citation.] Rather, prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed '"on a practical level . . . ."'"].)

We review the trial court's prevailing party determination for abuse of discretion. (See *Donner Management Co. v. Schaffer*, *supra*, 142 Cal.App.4th at p. 1310; *Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249, 257; *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577 ["request for an award of attorney fees is entrusted to the trial court's discretion and will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence"].)

2. *The Trial Court Did Not Abuse Its Discretion in Awarding Ramos and Duldulao Attorney Fees*

The parties' attorney fee agreement authorizes the prevailing party to recover attorney fees for any claim asserted in a lawsuit whether contract, statutory or tort, "arising out" of the purchase agreement. Thus, the Brioneses' dismissal of their action, while precluding recovery for their contract claims under section 1717, subdivision (b)(2), does not necessarily bar an award of attorney fees to Ramos and Duldulao as prevailing parties as to the balance of the action. Nonetheless, as the Supreme Court explained in *Santisas*, *supra*, 17 Cal.4th at page 621, "[I]t seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested

relief, or if the plaintiff dismissed for reasons, such as the defendant's insolvency, that have nothing to do with the probability of success on the merits." Relying largely on this statement, the Brioneses contend the trial court erred in determining Ramos and Duldulao were the prevailing parties because they had dismissed the action in response to Ramos's repeated claims she was insolvent and had filed (or would file) for bankruptcy and because, having settled with the other defendants for more than half the $25,000 they had offered to settle with Ramos, they had achieved most of their litigation objective.

The Brioneses have failed to demonstrate the trial court abused its discretion in finding Ramos and Duldulao were the prevailing parties in the lawsuit. (See *In re Marriage of Eben-King and King* (2000) 80 Cal.App.4th 92, 118 ["burden is on the complaining party to establish abuse of discretion"].) On this appellate record, which does not include a transcript from the hearing on the motion for attorney fees or a copy of the Brioneses' complaint, there is simply no basis to conclude the trial court improperly found the dismissal of Ramos and Duldulao and the successful conclusion of the case from their perspective were, from a practical standpoint, more of a litigation victory than anything the Brioneses had achieved. (See *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266 ["'[A] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'"].) The Brioneses "showing on appeal is insufficient [because] it presents a state of facts which simply affords an opportunity of a difference of opinion." (*King*, at p. 118; see *ibid.* ["[w]here a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court"].)

DISPOSITION

The order is affirmed. Ramos is to recover her costs on appeal.[2]

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

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2 Duldulao did not appear in the appellate proceedings. Ramos's request for attorney fees on appeal is denied. (Code Civ. Proc., § 907 ["[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just"].) The record does not support Ramos's contention the only reason the Brioneses filed this appeal was to delay Ramos's collection efforts. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651 [sanctions for prosecuting frivolous appeals "should be used most sparingly to deter only the most egregious conduct"].)